

MONTANA PUBLIC DEFENDER COMMISSION

Helena Regional Office and Teleconference
139 N. Last Chance Gulch, Helena MT 59601

February 28, 2011

MINUTES

Approved at the August 29, 2011 Meeting

Commissioners Present

Ray Kuntz, Red Lodge; Margaret Novak, Chester; Terry Jessee, Billings; Charles Petaja, Helena; Richard (Fritz) Gillespie, Helena; Kenneth Olson, Great Falls

Commissioners Absent

Majel Russell, Billings; Caroline Fleming, Miles City; Bill Snell, Billings. Jennifer Hensley, Butte, has resigned.

Staff Members Present

Randi Hood, Chief Public Defender; Joslyn Hunt, Chief Appellate Defender; Eric Olson, Training Coordinator; Larry Murphy, Contracts Manager; Peter Ohman, Regional Deputy Public Defender (RDPD), Bozeman; Matt McKittrick, RDPD, Great Falls; Dan Minnis, RDPD, Havre; Harry Freebourn, Administrative Director; Cathy Doyle, Administrative Assistant

Liaisons

Nick Aemisegger, liaison for union attorneys, and Lisa Korchinski, liaison for non-management appellate defender staff and attorneys, were in attendance. Laura Masica, liaison for union support staff and investigators, had nothing to report and did not attend.

Interested Persons

Timm Twardoski, Executive Director, American Federation of State, County and Municipal Employees; Greg Martin, State Human Resource Division, Office of Labor Relations

1. Call to Order

Lacking a quorum, Chairman Fritz Gillespie began the meeting of the Montana Public Defender Commission at 8:45 a.m.

2. Approval of Minutes

Approval of the minutes of the January 10, 2011 meeting was deferred until later in the meeting due to the lack of a quorum.

3. Commission Liaisons

Nick Aemisegger, liaison for union attorneys, reported that he succeeds Laura Simonson as the liaison. He thanked Ms. Simonson for her work as the first attorney liaison. Chairman Gillespie said that he has heard some interest in arranging for public defenders to attend Commission meetings by phone to provide public comment. He asked Mr. Aemisegger to spread the word again that the liaison is to bring matters of discussion to the Commission. Mr. Aemisegger said that he is working on a draft policy to further define the role of the liaison and expects to present it to the Commission at the next meeting.

Lisa Korchinski, liaison for non-management appellate defender staff and attorneys, had no comments or concerns to submit at this time.

4. Committee Assignments

There are several committee vacancies due to the resignation of Commissioners Taylor and Hensley. However, two additional positions have expiring terms on July 1, 2011, and the composition of the commission might be changed during the legislative session. It was decided that committee assignments will remain as is until new members are appointed and the size of the commission is confirmed.

5. Collective Bargaining Update

Timm Twardoski and Greg Martin, representing labor and management respectively, reported that attorney negotiations are set to begin April 15. They plan to exchange proposals ahead of time to expedite the negotiation process. The negotiations for the support staff and investigator union will probably begin in May, following completion of the site surveys that are underway.

Commissioner Petaja reported on last week's Labor Management Committee (LMC) meeting. There was considerable discussion of the new case weighting system (CWS), which continues to evolve. Although it will never be perfect, the estimate is that it is now 90% or more accurate, improving the ability to ensure that the information going into the case management system is correct. The LMC also discussed modifications to DJ and DN case weightings, travel, treatment courts and whether the 150 unit mark should be a "cap" or a trigger. The CWS cap and the pay ladder will be two of the bargaining issues.

The Commission discussed the matter of timekeeping. Chairman Gillespie said that during the agency's budget hearing there was a suggestion that OPD do a time and motion study similar to what the judiciary underwent. Commissioner Kuntz noted that every lawyer struggles with timekeeping, and it can be difficult to get staff to report time accurately and consistently, especially when compensation isn't dependent on the timekeeping. Chief Hood said that the agency has made huge strides in timekeeping compliance, with the majority of regions better than 90%, and a couple at 100%. Commissioner Petaja discovered recently that county attorneys are not required to keep time at all, and he wondered how much time OPD spends keeping time and working on the CWS that could be used for casework? Chief Hood said that OPD must keep time because of the statute relating to payment. Chairman Gillespie said that another factor is that in terms of budget, the agency needs to be able to justify asking for more public defenders and timekeeping is one way to justify that need. Mr. Aemisegger said that the agency has made a lot of progress in making timekeeping easier for line attorneys; JustWare is a good tool, and there is now a benefit to them as attorneys to record notes while recording their time.

6. Public Defender Program Report

A. Chief Public Defender Report

Chief Hood said that the Legislature has been her primary focus since the last meeting. SB 187 has not yet had executive action. The first budget hearing before House Appropriations will be later this week. While in legislative waiting mode, she has been working on performance appraisals and expects to finish them this week. Last year she contacted multiple stakeholders in each region as part of the evaluation process, and this year she changed the focus to interactions with Central Office staff.

The lack of contract attorneys in Eastern Montana has been made more difficult by the departure of FTE attorneys in Glendive and Miles City. Hopefully those vacancies will be filled soon; in the meantime, significant travel costs are being incurred from the Billings area. Cut Bank and Libby are also experiencing a shortage, and she hopes to gain positions during the legislative session to alleviate the problem.

Chief Hood elaborated on the site surveys Mr. Twardoski referred to. A desk audit is being conducted statewide to find out what individual support staff members are doing in each office. The intent is to identify best practices statewide, as well as ensure that job descriptions are correct.

Chief Hood gave highlights of the field report summary. She is impressed that every region is reporting trial and motion activity, and believes that providing investigators has made a big difference in the system.

Chairman Gillespie asked Chief Hood to explain item E.3 of the field report summary regarding payment agreements. Chief Hood said that there are very few of these “side agreements” but there has been good success when they are used. The agreements are made with people who are really on the margins, and qualify under the hardship rule. Regional Deputy Public Defender Peter Ohman said that in the Bozeman office, these people are just barely over the income limit, and don’t have the ability to hire an attorney, although they might have the ability to pay some amount toward their defense. The hardship determination is also somewhat dependent on the type of case, but of course OPD must first be appointed by the court. Chairman Gillespie said that there is some perception that the public defender system has infringed on private practitioners in certain areas, so the agency must document these hardship cases and why OPD has agreed to represent them. He also suggested forming a task force to deal with eligibility, possibly looking at changing the statutory guidelines.

B. Legislative Update

Chairman Gillespie said that Senator Shockley’s bill, SB 187, has been classified as a revenue bill, so it was not subject to the transmittal deadline for general bills. The proposed amendments will not be considered until executive action is taken, but some of them are problematic. Chairman Gillespie has developed a memo regarding the constitutionality of certain amendments, which he will distribute to members of the Senate Judiciary Committee as well as the Commission.

Mr. Freebourn prepared a legislative update, showing the requested and approved (to date) amounts in HB 2. There may be amendments presented to restore the governor’s budget, but there are still a lot of steps in the budget process with 45 days to go.

C. Budget

Mr. Freebourn presented the financial statement and said that he will be looking very closely at the supplemental amount with both Chief Hood and Chief Hunt over the next few days.

Mr. Freebourn reviewed the Financial and Operating report. Commissioner Petaja asked about the increase in fee collections shown on page 6. The increase is due to increased assessments by the courts, plus the fact that a base is being built against which people continue to pay. Collections are expected to continue to increase as the base grows. The Commission discussed the costs in staff time to collect and whether it is cost-effective; what the role of the agency should be in collections and protections for debtors; and whether another agency should ultimately be responsible for collections. Mr. Freebourn assured the Commission that the agency is only performing the accounting functions required to process the assessments, and is not acting as a collection agency.

The budget approved by the Section D subcommittee leaves the agency about \$300,000 over the base budget so far. However, no individual budget items were approved. Commissioner Novak said that in the current political climate, the agency is doing an amazing job in not taking big budget hits, and she thanked the staff for their efforts. Commissioner Kuntz agreed.

D. Contracts

Mr. Murphy reported that he continues to conduct Standards Compliance interviews. He travels long distances but is unable to see all of the contractors in a region during a single trip. However, Mr. Olson is developing an online tool that will save on travel time and should facilitate completing more interviews in a shorter time period.

Mr. Murphy presented new material developed for the website, describing how to become an OPD contract attorney. He emphasized in a note that potential contractors must read and comply with the Standards and should be familiar with the website materials, both of which can help the attorney do their job.

Commissioner Petaja asked if the new information on the website will help recruit contractors in areas where there is a shortage, such as Eastern Montana. Mr. Murphy said that despite actively pursuing new attorneys in Glendive and Miles City, they have an aging attorney population, some of whom are not willing to practice in certain jurisdictions. He suggested that higher pay for either contractors or FTE in that area might need to be considered.

A retained attorney in a homicide case withdrew 40 days prior to trial and OPD was appointed to represent the defendant. Unfortunately, this resulted in the client having to choose between their constitutional rights to a speedy trial or effective assistance of counsel, since OPD could not be prepared to go to trial on such short notice. Mr. Murphy views the withdrawal of the retained attorney due to lack of funds as an ethical violation, and Chief Hood said that some standard rules need to be developed to handle these types of cases. Chairman Gillespie asked Commissioners Olson and Kuntz to work with Chief Hood and Mr. Murphy to develop some talking points for the next meeting. Once the Commission has formulated a policy, they will try to get buy-in from the judiciary.

E. Training Report

Training Coordinator Eric Olson reported on a recent interagency mental health training co-sponsored by the Department of Public Health and Human Services and the Department of Corrections. Attendees included probation officers, county attorneys and public defenders and it was very well received. There has also been some DN training through the Court Assessment Program (CAP). Mr. Olson is currently working on a standards compliance and verification process through computer testing, as well one of his other responsibilities, sentence review, which is a quarterly process.

Chairman Gillespie initiated a discussion regarding training for DN cases and whether the standard is being met, especially in relation to contractors. Mr. Olson said that some regions contract out DN cases, and some handle them in-house. This is a practice area that requires extensive training, because it is complex and things change quickly. In addition to the CAP training, he offers quarterly DN updates, and there will be a comprehensive summit meeting in May. There is no fee to attend any of these training opportunities for either contractors or FTE. In larger metro areas, people get a large number of cases that justify the training time. In rural areas where they are getting few cases, it is more difficult to get someone to invest in that training, and in those areas the regional deputy has to be the trained individual and provide guidance as needed.

Chairman Gillespie asked if the current standard exceeds what is necessary to provide effective assistance of counsel? Mr. Olson said that the hourly requirement is certainly valid, but making it an annual requirement is probably not. An attorney who has never done a DN case needs a big immersion experience to get up to speed, but a regular practitioner does not need that level of

annual training. Commissioner Novak expressed concern about providing contractors with free training that they could take elsewhere and suggested some type of cost-sharing. Mr. Olson said that concern about padding credentials is not valid in this practice area because most attorneys representing people in DN cases are paid with public dollars; people with money don't find themselves in these situations. Chairman Gillespie said that he has heard complaints in the legislature that public defenders don't know the rules in DN cases, and it is important to make sure that both contract and FTE public defenders are provided with plenty of continuing education so they are competent in their areas of practice. Budgeting for additional training in this area should be discussed at a future meeting once the appropriation for the next biennium is known.

7. Public Comment

Lisa Korchinski commented on the possibility that the number of Commission members might be reduced by the Legislature. If there are fewer Commissioners, she would recommend a change to the operating procedures to further tighten the attendance requirements and increase the number needed for a quorum so that most of the Commission would be involved in decision making.

8. Appellate Defender Program Report

Chief Hunt reported that productivity is increasing. As of today, the number of new cases in February is 25, up from 10 when she did her written report on February 17. She is trying to mitigate transcript costs through a rule change that would not require the appellate office to purchase transcripts to provide to the prosecution. The amendment is in the public comment stage.

The case highlights included in Chief Hunt's report indicate more often that the plain language of the statute is correct. She anticipates several habeas petitions coming in. The Stiffarm decision will not prevent the Department of Corrections from using prior behavior to revoke clients immediately upon the start of a sentence.

Chief Hunt agreed that some guidance is needed on how to handle private attorneys who take all of a client's money and then expect OPD to take over when the money is gone. She sees it often at appeal and is in favor of approaching the courts when the policy is finalized. She will provide information on how this practice has affected the appellate office to Commissioners Kuntz and Olson.

Two other items were discussed in relation to the appellate office. A recent Helena case raises the question of what happens in the case of a pro se defendant with standby counsel when it gets to the appeal stage? It is something to consider. Finally, the recent Anderson case eliminating just notice will put a greater burden on both the defense and the prosecution. This was discussed at the recent video training, and ideas came from many regions. Challenges are being made and it will eventually work its way up to the Supreme Court.

9. Old Business/New Business

A. John R. Justice Loan Repayment Program

A working group of the Montana Board of Crime Control (MBCC) reviewed a total of 46 applications, half from prosecutors and half from public defenders. Under the terms of Montana's \$100,000 federal grant award, \$15,000 goes to MBCC to administer the grant, and the remainder is shared equally by prosecutors and defenders. The federal qualifications were based on debt/income ability with additional criteria based on geography, size of debt, and number of dependents. The working group recommended giving 10 awards of \$4,250 each for each group; the MBCC full board will review the recommendations and make the awards at their March meeting.

B. JustWare Update / Case Closing Document

Chief Hood distributed the latest versions of the case closing documents. They are generated out of JustWare and are pre-populated. The intent is print the documents for inclusion in the file. Implementation is underway in two offices so far.

C. Update on Revision of Indigency Questionnaire

Commissioner Petaja distributed a draft of the revised indigency questionnaire. The intent is to ensure that everyone receiving public defender services is truly eligible. Chairman Gillespie said that no action by the Commission is required, and it is ready to implement unless staff have concerns. The language regarding false swearing has been beefed up, and more information is requested under income, debts and assets, based on the information required on bankruptcy questionnaires. Some changes were discussed, including eliminating the social security number due to confidentiality issues, and the residency information, since that is not a requirement for eligibility. Mr. Freebourn suggested that the Commission consider the possibility that an administrative rule could be adopted during the interim if there are legislators who want this to have force of law.

A quorum was established at 12:40 p.m. when Commissioner Jessee joined the meeting.

Commissioner Novak moved to approve the minutes of the January 10, 2011 meeting. Commissioner Jessee seconded and the motion carried.

D. Proposed Change to Operating Procedures – Quorum Definition

Commissioner Jessee moved to change the Commission Operating Procedures to redefine a quorum as a majority of sitting commissioners instead of a fixed number. Commissioner Olson seconded. Commissioners Jessee and Petaja expressed concern about changing the number. The motion carried with Commissioner Petaja opposed.

The Commission discussed the possibility of a change to the size of the Commission and agreed that size is not a relevant issue. However, they recognized that as volunteers it can be difficult to make time for Commission business, and the consensus was that a larger number of members is preferable so that the committees have sufficient numbers. The committees successfully addressed all of the American University recommendations which might not have been possible with a smaller number of members.

Chairman Gillespie invited comments on his draft letter to the chief justice regarding specialty courts. He is encouraging some uniformity in these courts, including involving OPD in the planning and budgetary process. It represents a huge expense statewide and the agency has had no input to date.

Commissioner Jessee requested an agenda item for the next meeting regarding the role of the OPD mental health consultant. Chief Hood said that she is looking at several positions in the agency to determine what might be brought in-house.

E. Set future Commission meeting dates

The next meeting will be held after the legislature adjourns, perhaps in June. Staff will solicit availability. Commissioner Novak encouraged use of a more sophisticated way to meet than by conference call, such as Go to Meeting or videoconference.

10. Public Comment

Mr. Olson asked about the status of posting the conflict coordinator position? Mr. Freebourn requested input from the Commission on issues such as where the position is to be located, who will do the interviews, etc. Chairman Gillespie asked Mr. Freebourn to develop a list of questions to distribute to the Commission. Responses are to be forwarded to Mr. Olson, Mr. Murphy, and Commissioner Kuntz by March 15. They will then define a structure based on those comments for the Commission's review. No formal action will be required.

11. Adjourn

The meeting adjourned at 1:05 p.m.